REMARKS

Claims 25-45 remain pending in this application. Claims 25-32, 34-38 and 40-45 have been rejected under §103 as being obvious over U.S. Patent No. 6,623,207 to Grubba et al. (Grubba) in view of U.S. Patent No. 4,162,998 to Doi et al. (Doi). Claim 33 has been rejected under §103 as being obvious over Grubba and Doi and further in view of U.S. Patent No. 4,373,961 to Stone (Stone). The Office Action states that claim 39 contains allowable subject matter.

Applicant acknowledges with appreciation the courtesy extended to applicant's attorney during a telephone interview on March 16, 2005. Examiner Alexandra Pechhold and applicant's attorney, Susan Bell, participated in the interview. U.S. Patent No. 6,623,207 to Grubba et al. (Grubba) was discussed. Applicant's attorney pointed out that Grubba was not prior art under §102(a) and therefore should be removed from the §103 rejection.

As discussed in the telephone interview and as stated in the Office Action, Grubba has been disqualified as prior art through 35 U.S.C. §102(e), (f) or (g) in any §103 rejection of the present application. Further, as discussed in the telephone interview, Grubba does not qualify as prior art through 35 U.S.C. §102(a) in any §103 rejection of the present application.

35 U.S.C. §102 states the following:

"A person shall be entitled to a patent unless –

(a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for a patent."

As pointed out in the telephone interview, Grubba was not known or used by others before June 14, 2001, which is the priority date of the present application (the present application

is a continuation of application serial no. 09/881,491, which was filed on June 14, 2001). Further, Grubba was not patented or described in a printed publication before June 14, 2001. Accordingly, Grubba is not a proper §102(a) reference for use in a §103 rejection of the present application.

MPEP §2132 states that "the statutory language 'known or used by others in this country' means knowledge or use which is accessible to the public." (citing Carella v. Starlight Archery, 804 F.2d 135, 231 U.S.P.Q. 644 (Fed. Cir. 1986)). *See also* Woodland Trust v. Flowertree Nursery, Inc., 47 U.S.P.Q.2d 1363, 1365 (Fed. Cir. 1998). The examiner has provided no evidence that Grubba was accessible to the public before the June 14, 2001 priority date of the present application, which is deemed applicant's date of invention unless an earlier date of invention is shown.

Further, MPEP §2126 states that "[t]he date that the patent is made available to the public is the date it is available as a 35 U.S.C. 102(a) or (b) reference." (citing In re Ekenstam, 256 F.2d 321, 118 U.S.P.Q. 349 (C.C.P.A. 1958)). *See also* In re Carlson, 25 U.S.P.Q.2d 1207, 1211 (Fed. Cir. 1992). Still further, MPEP §2126.01 goes on to state that "[t]he date the patent is available as a reference is generally the date that the patent becomes enforceable." Thus, Grubba was not available as a patent reference until it issued on September 23, 2003, and this date is long past the June 14, 2001 priority date of the present application.

As to the date when a printed publication is available as a reference, MPEP §2128.02 addresses this issue by stating that a printed publication is considered a prior art reference on the date that the publication is available to the public. MPEP §2128 defines the statutory language "printed publication" by stating that "[a] reference is a 'printed publication' if it is accessible to the public". U.S. Patent No. 6,623,207 to Grubba was not accessible to the public until it

became an issued patent on September 23, 2003. Further, U.S. Publication No. US 2002/0197109, which is the published application from which U.S. Patent No. 6,623,207 to Grubba issued, was not accessible to the public until it was published on December 26, 2002. Thus, neither U.S. Patent No. 6,623,207 to Grubba nor U.S. Publication No. US 2002/0197109 was available to the public before the June 14, 2001 priority date of the present application so as to be a printed publication before applicant's invention.

For the foregoing reasons, which were discussed in the telephone interview, Grubba does not qualify as prior art under 35 U.S.C. §102(a) and cannot be used as §102(a) prior art in a §103 rejection. As further pointed out in the telephone interview, once Grubba, which is the primary reference in both of the §103 rejections of the present application, is removed as prior art, claims 25-45 should be allowed. While an agreement was not reached in the telephone interview, the examiner stated that she would review the MPEP cites pointed out during the interview after it was over.

Once Grubba is removed as prior art, the §103 rejections citing Doi and Stone cannot stand. A *prima facie* case of obviousness is not made with these references. As pointed out in the Office Action, Doi is merely cited because it discloses a raveling test in Example 2. Further, as pointed out in the Office Action, Stone is merely cited to teach a cationic emulsion that imparts anti-strip properties when blended with aggregate. Neither Doi nor Stone nor the combination thereof discloses numerous features of applicant's claimed invention including testing an asphalt emulsion mixture made of reclaimed asphalt pavement particles for performance using a raveling test **and** a moisture susceptibility test, as claimed in claims 25-45.

In view of the foregoing remarks, it is respectfully submitted that the claims are in condition for allowance and eventual issuance. Such action is respectfully requested. Should the

examiner have any further questions or comments that need be addressed in order to obtain allowance, please contact the undersigned attorney at the number listed below.

Acknowledgement of receipt is respectfully requested.

Respectfully submitted,

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